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EX PARTE

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 02-33, *In the Matter of Appropriate Framework for
Broadband Access to the Internet Over Wireline Facilities*

Dear Ms. Dortch:

In previous *ex parte* presentations, Qwest has outlined its overall position in this proceeding.¹ In light of the incumbent local exchange carriers' ("ILECs") lack of market power in the provision of "mass market" broadband services,² the Commission should begin to rationalize its regulation of DSL and cable modem services by taking the steps described below. If the Commission does so, Qwest commits to continue to offer to Internet Service Providers ("ISPs") for at least two years after the date of the Federal Communications Commission's ("Commission" or "FCC") Order open and nondiscriminatory access to Qwest's Digital Subscriber Line ("DSL") end user customers. Qwest believes that this compromise proposal provides ISPs a reasonable transition period, as the Commission moves to a more rational and equitable broadband policy. Qwest describes this proposal in more detail below, and also responds to certain *ex parte* presentations filed by other parties in this proceeding.

I. Qwest's Proposed Treatment of DSL Services

Qwest proposes the following treatment of DSL services to meet the continuing market needs of end users, ISPs, and LECs:

1. The Commission declares DSL service bundled with Internet access to be an information service subject to Title I, free of *Computer II* and *Computer III* requirements; and

¹ See Qwest *ex parte* submissions of May 21, 2003, June 18, 2003, and June 24, 2003.

² For purposes of this *ex parte* submission, "mass market" broadband services refer to those services provided to residential and small and medium business users.

2. The Commission gives LECs the option of providing bulk DSL services to ISPs as private carriage subject to Title I; and
3. Contingent upon grant of the relief above, Qwest commits to continue to offer its current ***Qwest DSL Host*** service, or a similar offering, to ISPs for a minimum of two years from the date of an FCC Order, at which point this requirement would sunset, and thereafter via contracts.

This proposal reasonably balances the urgent need for the Commission to revise its regulation of broadband services provided by LECs to reflect the technological and commercial realities of the broadband marketplace with a desire to avoid sudden disruption of the business plans of ISPs that serve DSL customers over ILEC networks.

As Qwest explained in detail in its comments and reply comments, the regulatory relief outlined above is long overdue. Under current regulations, LECs, whose market share for mass market broadband services lags far behind that of rival cable modem providers, are subject to the greatest regulatory constraints. This asymmetry threatens a perverse result whereby LECs—the best hope for competition for mass market broadband services—are stifled in their ability to compete by the regulatory *status quo*. More than a year ago, the Commission granted the relief proposed above to cable modem providers, the dominant players in the broadband mass market. This fact alone compels the Commission to provide the same relief to DSL providers. However, this relief is also required under the Commission’s existing precedent. Bundled DSL/ISP services are plainly “information services,” with no separate offering of telecommunications to the end user.³ Likewise, the sale of bulk DSL capacity to ISPs satisfies the requirements of private carriage established in *NARUC I* and its progeny.⁴ Finally, given the nature of the dynamic broadband marketplace, there is no basis for maintaining the requirements of *Computer II and III* in this context.⁵

While it is imperative for the Commission to grant this relief as expeditiously as possible, some may be concerned about potential dislocation in the ISP industry. The two-year transition period proposed by Qwest will allow ISPs additional time to gain sufficient customers to negotiate a commercial DSL arrangement with the LECs. The adoption of such a transition period is by no means a novel approach. In the *ISP Remand Order*, the Commission established a transition period, during which the intercarrier compensation rate for ISP traffic stepped down over time, in order “to avoid a ‘flash cut’ . . . that would upset the legitimate business

³ See Qwest Comments at 4-8.

⁴ See Qwest Comments at 12-20.

⁵ See Qwest Comments at 23-32.

expectations of carriers and their customers.”⁶ The Commission adopted a similar approach in constraining competitive local exchange carrier (“CLEC”) access charges.⁷

In this case, ISPs will continue to have access for at least two years to Qwest’s DSL end users, as they do today. Currently more than 400 ISPs take advantage of the ***Qwest DSL Host*** service, which Qwest has voluntarily tariffed since it began providing DSL services. Qwest designed this service to satisfy the demands of end users that want to choose their own ISP, whether to maintain preexisting e-mail addresses as they move from dial-up to broadband, to avoid spam that is sometimes more prevalent with larger ISPs, or for any other reason. Qwest has viewed, and continues to view, these independent ISPs as yet another channel to market Qwest’s DSL services. The ***Qwest DSL Host*** service has proven to be a very successful sales channel for Qwest. Today, more than 20 percent of Qwest’s DSL customers are served via this service. This service also meets the market needs of ISPs who do not yet have sufficient volumes to purchase DSL in bulk; enables ISPs to utilize Qwest as a sales channel for their Internet access services; enables unfettered access to Qwest end users, unlike the end users of some cable modem providers; and allows ISPs to control access to Internet content.

The Qwest DSL service today is comprised of two tariffed components, one component purchased by the end user customer and the other component purchased by the ISP:⁸

- DSL access sold and billed by Qwest to end users
 - *End-users may subscribe to the ISP of their choice from a list of 400+ participating ISPs*
 - *Service offered under F.C.C. Tariff No. 1, Section 8*
- ***Qwest DSL Host*** service purchased by the ISP (once per LATA)
 - ***Qwest DSL Host*** service consists of Asynchronous Transfer Mode (“ATM”) switch port and Bandwidth elements
 - Any ISP may purchase ***Qwest DSL Host*** service, resulting in open access to end users
 - *Tariffed in F.C.C. Tariff No. 1, Section 8*

⁶ *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket No. 99-68, 16 FCC Rcd 9151, 9186 ¶ 77 (2001).

⁷ *In the Matter of Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, 16 FCC Rcd 9923, 9941 ¶ 45 (2001) (“We do not . . . immediately set the benchmark rate at the competing ILEC rate because such a flash cut likely would be unduly detrimental to the competitive carriers that have not previously been held to the regulatory standards imposed on ILECs.”).

⁸ See Attachment 1 for a schematic drawing of the service.

In this scenario, the ISP sells and bills its Internet access service directly to its end-user customers. The end users' access to Internet content is controlled by the ISP who purchases the *Qwest DSL Host* service, and not by Qwest.

II. Qwest's Response to other Parties' Ex Parte Submissions

Various parties have argued that the ILECs' mass market broadband services, including services offered to ISPs on a bulk basis, must continue to be regulated under Title II even though the Commission has largely deregulated cable modem providers, who are the dominant players in the marketplace today. These parties also propose "streamlining" of current Title II regulation, which at most would "create" the perception of regulatory reform without any meaningful change. Finally, commenters wrongly assert that ILECs are dominant in the provision of broadband services.

A. The Commission Should Give LECs a Choice of Providing Bulk DSL Services to ISPs on a Private Carriage Basis

Earthlink, AT&T and other parties have asserted that the Commission cannot allow LECs to provide DSL services to ISPs on a private carriage basis, because up until now every ISP has had guaranteed access to the ILECs' DSL services on a common carrier basis. This argument is the height of circular reasoning. It assumes that there is a separate market for wholesale DSL services, because the FCC has so far chosen wireline broadband providers, but not the cable modem providers, to provide such services on a common carrier basis. The Commission cannot logically rely on the consequences of an unjustifiable regulatory asymmetry to perpetuate that very asymmetry.

BOC wholesale services guarantee ISPs access to only one third of broadband customers today, given cable modem providers' dominance of this market. Unlike the one-wire world that may have existed when the *Computer Inquiry* requirements were adopted, broadband services are subject to vibrant facilities-based competition today. Any discretion that the Commission had as to when and how it would free ILECs of common carrier obligations for these bulk sales to ISPs was eliminated when the Commission issued the *Cable Modem Order*. At this point, the Commission lacks such discretion, because it has no plausible rationale for subjecting ILECs to greater regulatory burdens than their first-place cable company rivals.

The Commission has a long history of allowing nondominant providers to choose to provide transmission on a private carriage basis, even if they provide other services on a common carriage basis. For example, WorldCom and Sprint are treated as common carriers with respect to their retail long-distance businesses but are not treated as common carriers with respect to their Internet backbone services—even though in many cases those two classes of

services are provided over the same underlying facilities.⁹ Similarly, ILECs have been treated as common carriers when they use their lines to provide basic telephone service but not when they use the same lines to provide bundled information services or video services.¹⁰

ILECs' bulk DSL offerings clearly meet the test for private carriage adopted in *NARUC I*. The fact that the Commission's rules currently require ILECs to offer these services on a common carrier basis does not provide a legitimate basis for maintaining those rules, particularly given the Commission's decision in the *Cable Modem Order*. Moreover, sales of bulk DSL capacity are often "tailored to the needs of particular customers," the customers themselves are typically quite sophisticated, and the sales agreements are generally "medium-to-long range."¹¹

Allowing ILECs to provide bulk DSL services on a private carriage basis will further the Commission's goal of rationalizing the regulation of broadband services regardless of the platform that is used to provide those services. This relief will not eliminate ISPs' ability to gain access to the ILECs' broadband networks. As discussed above, Qwest is proposing a two-year transition period during which ISPs will have access to Qwest's broadband customers in a manner similar to that which they enjoy today. Even after this period, ILECs will have every incentive to enter into commercial arrangements with ISPs as an additional sales channel for the ILECs' DSL services. For ISPs that consumers value, an ILEC would risk losing large numbers of DSL customers if it refused to deal with those entities. Qwest has demonstrated this incentive to work with ISPs over the past several years by voluntarily offering the *Qwest DSL Host* service.

B. The Commission Should Reject Proposals to "Streamline" Computer II and III Requirements

On May 1, 2003, Earthlink, MCI and AOL Time Warner submitted a proposal that purports to "streamline" the existing *Computer Inquiry* requirements.¹² This proposal starts from the flawed premise that ILECs should continue to be subject to some form of these requirements, even though the Commission has already exempted their cable competitors from these burdens.

⁹ *In re Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18116-17 (1998).

¹⁰ *In the Matter of Price Cap Performance Review for Local Exchange Carriers*, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, 12 FCC Rcd 16642, 16715 (1997).

¹¹ *In the Matter of NORLIGHT Request for a Declaratory Ruling*, Declaratory Ruling, 2 FCC Rcd 132, 134 (1987); see also *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("*NARUC I*").

¹² Letter from Donna Lampert, counsel for Earthlink, to Marlene H. Dortch, FCC (May 1, 2003).

As discussed above, such an approach cannot be sustained given today's market conditions. Furthermore, the proposed rules maintain the most burdensome aspects of the *Computer Inquiry* regime, such as the requirement for advance disclosure. Such disclosure provides intermodal competitors, including cable modem providers, advance notice of an ILEC's promotions and other new offerings, allowing competitors an ability to neutralize the ILEC's promotion by "matching" it before it is even launched.

This proposal also would add new, complicated provisions that would in no way simplify or "streamline" the current *Computer Inquiry* requirements. For example, Earthlink, MCI, and AOL Time Warner propose a draconian enforcement provision that would presume that an ILEC has failed to comply with the *Computer Inquiry* requirements unless it can provide detailed documentation in its defense within 15 days. This provision can be expected to trigger a flood of litigation, as ISPs attempt to obtain leverage over ILECs. The enforcement provision will also require ILECs to maintain cumbersome documentation simply to defend itself against a potential complaint from every ISP to which it provides service.

The parties fail to justify their position that these new requirements will provide "consumer benefits, including robust price and service competition among BOC-affiliated and unaffiliated ISPs, creating innovation, diversity and demand for broadband services."¹³ To the contrary, these requirements will undermine the facilities-based broadband competition that enables innovation and new service offerings. Given these facts, the Commission should not give any further consideration to this proposal.

C. ILECs Lack Market Power in the Provision of Broadband Services

In its May 21, 2003 *ex parte* presentation, Qwest showed that ILECs are not dominant in the provision of any broadband services. Qwest demonstrated that with respect to both the mass market and large business market for broadband services, there are numerous competitors of various types. AT&T's criticisms fail to undermine the strength of the information submitted by Qwest. In both markets, ILECs are far outpaced by their competitors.

Mass Market. Throughout Qwest's territory, there are multiple types of broadband providers to residential and small business customers, including CLECs, ISPs, DSL providers, cable modem providers, wireless providers and satellite providers. AT&T suggests that this evidence of competition should be ignored because some of the competitors currently provide service in limited areas. That a particular provider does not offer ubiquitous service, however, does not change the fact that the provider constrains prices of competing services in those areas where it operates. Qwest's *ex parte* showed that multiple broadband providers can be found in places throughout Qwest's region. Furthermore, AT&T ignores the vast coverage of cable modem providers. According to a cable trade association, more than 85 million homes are

¹³ *Id.* at 3 (April 30, 2003 attachment entitled "Proposal to Streamline Title II Regulation of BOC Advanced Services to Promote Diverse Information Services").

passed by cable modem service,¹⁴ which represents nearly 80 percent of households in the U.S.¹⁵ This competition extends to small business customers, as well as residential customers. Cable modem providers are increasingly marketing to small business customers,¹⁶ and other competitors focus exclusively on this segment. As noted above, the fact that ILECs are the primary providers of wholesale services in this market ties directly to the Commission's asymmetric regulations to date, and therefore provides no basis for a finding of dominance.

Large Business Market. As Qwest demonstrated in its comments and May 21 *ex parte*, AT&T, WorldCom and Sprint hold the vast majority of the national market for broadband services, with approximately 85% of the revenues for frame relay services and 70% of the revenues for ATM services. AT&T seeks to downplay this fact, by relying on discredited arguments regarding the ILECs' "bottleneck control of special access services." As Qwest showed in response to AT&T's petition, which would effectively impose rate-of-return regulation on special access services, AT&T's arguments rely on flawed data and analysis.¹⁷

While AT&T focuses on the "local" data market, it neglects to tell the complete the story. Today, purchasers of ATM and frame relay services do not merely purchase a local service, but also national and in some instances international coverage. Local service is nearly always combined with a national/international provider, or alternatively the customer purchases the entire service directly from one national or international provider servicing all of their needs. To further demonstrate this point, the revenues generated by local providers of ATM and frame relay service are a small fraction of the revenues generated by national/international players such as AT&T.

¹⁴ See National Cable & Telecommunications Association Website: <http://www.ncta.com/Docs/PageContent.cfm?pageID=86>.

¹⁵ The U.S. Census Bureau projected there would be approximately 106.6 million households in 2003. See Census Bureau Website: <http://www.census.gov/population/projections/nation/hh-fam/table1n.txt>.

¹⁶ See Cox Communications Website: <http://www.cox.com/Fairfax/ForYourBusiness.asp>.

¹⁷ See Opposition of Qwest Communications International Inc., RM No. 10593 (Dec. 2, 2002).

III. Conclusion

In closing, Qwest has demonstrated that ILECs are not dominant in the broadband marketplace, including the mass market encompassed by the consumer and small business segment. Recognizing the competition in this market, the Commission should begin to rationalize its regulation of DSL and cable modem services, as well as other broadband services provided by the ILECs. Qwest's transition proposal accomplishes this objective, while avoiding a "flash cut" for ISPs.

Finally, in accordance with Rule 1.49(f), 47 C.F.R. Section 1.49(f), this *ex parte* letter is being filed electronically for inclusion in the public record of the above-referenced docket pursuant to Rule 1.1206(b)(1), 47 C.F.R. Section 1.1206(b)(1).

Sincerely,

/s/ Cronan O'Connell

Attachment

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QWEST DSL HOST SERVICE

Qwest DSL HOST Service * is purchased once per LATA by an ISP

Service includes: **ATM Switch Port (BSE) + Bandwidth (BSA)**

** Tariffed in FCC No.1, Section 8*

